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SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA

2009 NOV -9 PM 3: 16

JEANNE NICKS, CLERK

BY: Shaunna Kelbaugh

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA

Plaintiff,

vs.

STEVEN CARROLL DEMOCKER,

Defendant.

No. P1300CR20081339

Division 6

**REPLY IN SUPPORT OF
DEFENDANT'S MOTION TO
DECLARE A.R.S. §§ 13-4431 AND
4433(b)-(e) AND ARIZONA RULE
OF CRIMINAL PROCEDURE
39(B)11 UNCONSTITUTIONAL**

(Oral Argument and Evidentiary
Hearing Requested)

Defendant Steven DeMocker, by and through counsel, hereby replies to the State's response to his request that this Court declare Sections 13-4431 and 4433(b)-(e) of the Victims' Rights Implementation Act ("VRA") and Arizona Rule of Criminal Procedure 39(b)(11) unconstitutional. The State's response does not address or refute key aspects the unconstitutionality of these provisions and misrepresents the facts with respect to victims Katie and Charlotte DeMocker.

ARGUMENT

1 **I. The Legislature Exceeded its Limited Authority Under the Victims'**
2 **Bill of Rights in Enacting Sections 4431 and 4433(b)-(e) of the**
3 **Victims' Rights Implementation Act**

4 The State's response acknowledges that the legislature's rulemaking power under
5 the Victims' Bill of Rights ("VBR") is limited. (State's response at 3, *citing State ex*
6 *rel. Napolitano v. Brown*, 194 Ariz. 340, 982 P.2d 815 (1999)). However, the State
7 asserts that A.R.S. 13-4431 and 4433(b)-(e) are within the limited rulemaking authority
8 of the legislature because a victim may not be compelled to submit to a pretrial
9 interview and because victims have a right to be free from harassment. Those rights are
10 explicitly provided for in the VBR. However, the limited legislative rulemaking
11 authority requires that A.R.S. 13- 4431 and 4433(b)-(e) be specifically created to
12 "define, implement, preserve, or protect" these rights. The State has made no attempt to
13 explain how these provisions have anything to do with either of these rights. And in
14 this case, the provisions have actually been at odds with the rights they are supposed to
15 be designed to "define, implement, preserve, or protect."

16 The provisions at issue provide that the defense can only initiate contact with the
17 victim through the prosecutor's office; requires the prosecutor to advise the victim of
18 her right to refuse a defense interview but does not require the prosecutor to advise the
19 victim that she has a right to refuse the prosecutors presence at interviews; provides that
20 the prosecutor is not required to pass along written correspondence from the defense to
21 the victim; requires the prosecutor to act as an intermediary between the victim and the
22 defense in the event the victim does consent to be interviewed; permits the prosecutor to
23 record a victim interview even where the victim has elected that the prosecutor not
24 attend the interview; and provides that the court is required to "provide appropriate
25 safeguards" to minimize contact between the victim, the victim's immediate family or
26 witnesses and the defendant's family and witnesses. These provisions do not
27 implement, preserve or protect the right to be free from intimidation, harassment or
28

1 abuse or the right to refuse an interview. In fact, several provisions of the VRA are
2 obviously for the benefit of the prosecution and not for the protection of victims' rights.
3 This is undisputed in the State's response. The State's response also does not dispute
4 that the interests of victims and prosecutors are not necessarily aligned.

5 These provisions go far beyond the rights enumerated in the VBR, do not support
6 the rights in the VBR and, as is evident in this case, actually conflict with the rights
7 provided to victims in the VBR. While the State responds that the prosecution is neither
8 the "gate-keeper" or "decision-maker" under these statutes, (State's response at pg. 5), it
9 does not dispute that under these provisions the only defense contact with a victim must
10 be through a prosecutor, and the prosecutor is not required to give the victim any written
11 correspondence from the defense. These provisions also require a prosecutor to act as
12 an intermediary between the victim and the defense in the event the victim does consent
13 to be interviewed, the prosecutor informs the defendant when and where the victim
14 elects to be interviewed. Therefore, even when a victim does elect to be interviewed,
15 the defense is not permitted to even schedule the interview with the victim. A
16 prosecutor is also not required to advise the victim that she has a right to refuse a
17 prosecutor's presence at interviews. Finally, even if the victim decides that she does not
18 want a prosecutor to attend a defense interview, the statute permits a prosecutor to
19 record the interview.

20 A.R.S. §13-4431 and 4433(b)-(e) go well beyond the rights enumerated by the
21 VBR and invade the Court's rulemaking authority by controlling a defendant's ability to
22 investigate, discover and present evidence in her defense. The court, and not the
23 legislature, is empowered to formulate its own procedural rules. *Shumway*, 166 Ariz. at
24 91, 800 P.2d at 594. As the Supreme Court noted in *Shumway*, to survive constitutional
25 scrutiny, the statutory enactment of the VBA must be limited to the rights created in the
26 statute, "if broadly construed, the rulemaking provision of [the VBA] is a separation of
27

1 powers provision that goes far beyond victims' concerns and therefore does not pertain
2 to the same subject as the rights provisions of the proposal." *Id.* For these reasons,
3 these provisions should be stricken as unconstitutional under Articles Three and Six of
4 the Arizona Constitution.

5 **II. Sections 4433(b)-(e) and Arizona Rule of Criminal Procedure**
6 **39(b)(11) Violate Victims' Rights and Conflict with the Victim's Bill**
7 **of Rights**

8 Contrary to the State's assertion in its response that "the County Attorney's
9 Office did nothing to purposefully designate the victims daughters as victims" (State's
10 Response at pg 5), at Mr. DeMocker's initial appearance on October 24, 2008,
11 Assistant Yavapai County Attorney Hughes requested that Mr. DeMocker have no
12 contact with Katie and Charlotte DeMocker. (Transcript of Initial Appearance at page
13 6, attached as Exhibit A). Mr. Sears explained that both Katie and Charlotte wanted to
14 have contact with their father and wanted to participate in the case. (*Id.*). In response
15 Mr. Hughes explained that "the victim's rights law is such that the victims are going to
16 have to opt out of – in other words, the victims are going to have to affirmatively ask to
17 have contact. They have not done that." (*Id.*). Judge Markham responded, "Okay. I
18 think – I think that that's kind of my understanding, too, Mr. Hughes. The ____ might be
19 that they opt out and do want contact with their father, but I will say, Mr. DeMocker,
20 until further notice, no contacting Ruth Simpson, or the mother of the victim, and no
21 contacting either Charlotte or Katie until further notice your daughters. *If they opt out*
22 *of the victims' rights provision and want contact*, they will certainly have the
23 opportunity to let everybody know that, and if they say that, certainly I would unring
24 that particular bell without contacting Charlotte and Katie if that was their wish." (*Id.*)
25 Pursuant to the County Attorney and Court's direction and the Victims Rights Act, both
26 Charlotte and Katie "opted out" of their rights under the VBR so that they could have
27 contact with their father.

The direction of the Court and Mr. Hughes requiring Charlotte and Kate to “opt out” was consistent with what the Arizona legislature requires in A.R.S. 13-4433(b)-(e) and what the Arizona Supreme Court countenanced in Rule 39(b)(11)— in direct contradiction to the Victims’ Bill of Rights’ enumerated rights right to be treated fairly, with respect and dignity and to be free from intimidation, harassment or abuse; the right to receive certain information upon request; the right to be present, and be heard, at criminal proceedings; the right to refuse discovery requests made on behalf of the defendant; the right to confer with prosecutors; the right to read pre-sentence reports available to the defendant pertaining to the crime; the right to receive prompt restitution from the perpetrator or perpetrators; the right to a speedy trial and prompt and final conclusion; and the right to be informed of these rights. *See* Ariz. Const. art. 2, § 2.1(A)(1)-(12).

For this reason 4433(d) and Rule 39(b)(11), which were allegedly designed to implement the VBR, violated the VBR in this insistence. The legislature does not have the authority to restrict rights created by the people through constitutional amendment. *See State v. Roscoe*, 185 Ariz. 68,72-73 912 P.2d 1297, 1301-02 (1996) citing *Turley v. Bolin*, 27 Ariz. App. 345, 554 P.2d 1288 (Ariz. App. 1976).

The Arizona Supreme Court has invalidated provisions of the VRA and Rule 39(b) that conflict with the VBR. *Roscoe*, 185 Ariz. 68, 912 P.2d 1297. Section 4433(b) and Rule 39(b)(11) should be struck as violating the VBR by only providing rights to those victims who agree to be controlled by the prosecution. These rights in the VBR are not limited to this special class of victims. “The language of the constitutional provision is plain, and we may look no further.” *Id.*

III. Sections 4431 and 4433(b)-(e) and Arizona Rule of Criminal Procedure 39(b)(11) Improperly Interfere with Mr. DeMocker's Sixth Amendment and Due Process Rights

1 The State's response does not dispute that Mr. DeMocker's Sixth Amendment
2 and due process rights require that counsel fully investigate his case and have
3 unadulterated access to witnesses so that he may prepare and present a defense. The
4 State does not deny that a defendant has a due process right, under the federal and
5 Arizona constitutions, to present a defense or that counsel have an obligation to
6 interview witnesses to the crime and interview members of the victim's family and that
7 the work of defense-initiated victim liaisons has become an essential part of the defense
8 function in capital cases.

9 Instead the State cites to authority that a victim's right to refuse a pretrial
10 interview does not violate due process. This authority is irrelevant and inapposite. A
11 victim's right to refuse a pretrial interview has nothing to do with the Sixth Amendment
12 and due process rights implicated by the prosecution's authority under these statutes to
13 interfere with and control the interaction between the defense and a victim. The State's
14 response also does not address that these provisions giving exclusive access to the
15 prosecution also pose a risk that the prosecutor may improperly interfere with a victim's
16 decision to grant a defense request to meet or for an interview. Section 4431 and
17 4433(b)-(e) and Arizona Rule of Criminal Procedure 39(b)(11) directly conflict with
18 counsels' obligations under the Sixth Amendment, due process, the ABA Guidelines
19 and Rule 6.8 of the Arizona Rules of Criminal Procedure.

20
21 **IV. Section 4433(b)-(e) and Arizona Rule of Criminal Procedure 39(b)(11)**
22 **Violate the First Amendment of the United States' Constitution and**
23 **Article II of the Arizona Constitution**

24 The State's response makes absolutely no attempt to salvage the provisions of the
25 VRA and Rule 39(b)(11) from the violations of the First and Fourteenth Amendments
26 of the United States Constitution as well as Article II, §§ 4 and 6 of the Arizona
27 Constitution because they are facially overbroad, not the least restrictive means and are
28 an invalid prior restraint on speech.

1 Section 4433(b) and Rule 39(b)(11) fail to satisfy an overbreadth analysis. Contact
2 by defense counsel is constitutionally protected speech for which the government has no
3 compelling interest to justify such an absolute restriction. Section 13-4433 prohibiting
4 all defense contact and Rule 39(b)(11) prohibiting all direct interview requests are
5 likewise not narrowly tailored to further the state's interest in protecting victims of
6 crime from further abuse. These provisions prohibit defense counsel from initiating any
7 contact with a victim.

8 Moreover, Section 4433(b) and Rule 39(b)(11), restrict both constitutionally
9 protected and unprotected expression, and are substantially overbroad. Section 13-
10 4433(B) and Rule 39(b)(11) prohibit not only the defendant, but defense counsel or any
11 other person acting on behalf of the defendant, from initiating contact with a victim
12 (4433(b)) or to request an interview (Rule 39(b)(11)). The state's legitimate interest in
13 protecting victims can be achieved by means less restrictive than an expansive
14 prohibition on any member of the defense contacting the victim.

15 Moreover, the state's interest in protecting victims from abuse can be realized
16 without prohibiting defense counsel from contacting the victim. This objective can be
17 attained by limits provided for under Arizona Rule of Criminal Procedure 39(b)(12) (a
18 victim may specify a reasonable date, time, duration and location for an interview or
19 deposition and may terminate the contact if not done in a dignified and professional
20 manner.)

21 Section 3344(b) and Rule 39(b)(11) are not narrowly tailored to serve the state's
22 interest in protecting victims' rights as enumerated in the VBR, but encompass all
23 classes of speech, including a substantial amount of constitutionally protected speech.
24 Nor are they the least restrictive alternatives for advancing such interests. Thus, the
25 provisions fail under an overbreadth analysis.
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27
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1 In addition to infringing on free speech as protected by the U.S. Constitution, the
2 Victims' Rights Implementation Act violates Article II, Section 6 of the Arizona
3 Constitution. Section 4433(b) and Rule 39(b)(11) should be struck as violating the
4 United States and Arizona Constitutions.

5 **CONCLUSION**

6 The legislature violated the Arizona Constitution when it exceeded its limited
7 rulemaking authority in enacting sections 4431 and 4433(b)-(3) of the VRA. These
8 provisions, along with Rule 39(b)(11), violate both the Arizona and United States
9 Constitutions by violating victims' rights and conflicting with the VBR; violating Mr.
10 DeMocker's Sixth Amendment and due process rights; and violating the free speech
11 guarantees of the First Amendment and Article II, Section 6 of the Arizona
12 Constitution. This Court should strike these provisions as unconstitutional.

13 For these reasons, Mr. DeMocker requests that this Court declare Sections 4431
14 and 4433(b)-(e) and Arizona Rule of Criminal Procedure 39(b)(11) unconstitutional.

15 DATED this 9th day of November, 2009.

16
17
18
19 By: 

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ORIGINAL of the foregoing filed

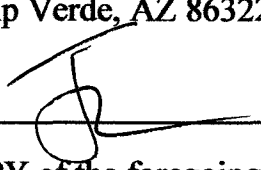
1 this th day of November, 2009, with:

2 Jeanne Hicks,
3 Clerk of the Court
4 Yavapai County Superior Court
120 S. Cortez
Prescott, AZ 86303

5
6 COPIES of the foregoing hand delivered
this th day of November, 2009 to:

7 The Hon. Thomas B. Lindberg
8 Judge of the Superior Court
9 Division Six
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10 Joseph Butner, Esq.
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13 
14 COPY of the foregoing has been sent
15 by U.S. Mail this th day of November,
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16 Terry Goddard, Arizona Attorney General
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1275 W. Washington
18 Phoenix, AZ 85007

19 Hon. Jim Weiers, Speaker
20 of the Arizona House of Representatives
1700 W. Washington, Room 221
Phoenix, AZ 85007

21
22 Hon. Timothy S. Bee
23 President of the Arizona Senate
1700 W. Washington, Room 204
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Magistrate Markham: And if we could see the last gentleman by himself, please.

Court Clerk: Yes, sir.

Markham: Do we have a closed door up there?

Court Clerk: Yes, sir.

Markham: Alright. Sir, your name is Steven Carroll DeMocker, sir? Is that right?

Steven DeMocker: Yes, Your Honor.

Markham: Mr. DeMocker, your mailing address, where would that be, sir?

DeMocker: 1716 Alpine Meadows Lane, number 1405.

Markham: Number 1405. Thank you, sir. That's in Prescott?

DeMocker: Correct.

Markham: That part of town, the zip code is--

DeMocker: 86303.

Markham: 86303. Thank you, sir. Now, Mr. DeMocker, were you listening as I told the first gentleman his rights in regards to a criminal case?

DeMocker: Yes, Your Honor.

Markham: Mr. DeMocker, let me know that--let me let you know that your attorney, John Sears, is down here. You can't see him because of where the camera is, but I'll just assure you that Mr. Sears is right next to me here down at the courtroom. Now, Mr. DeMocker, strong suggestion, remember your right to remain silent as I tell you, sir, you've been accused of first degree murder, as well as first degree burglary, armed burglary. Listen for any comments by victim, witness and/or the county attorney's office in this case.

Male: Your Honor, good morning. I spoke with Ruth Kennedy, one of the victims in this matter, this morning early in Nashville, Tennessee. She understands what is going on in this case and she did request that the defendant be held non-bondable. Thank you, Your Honor.

Markham: Yes.

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Bill Hughes: Good morning, Your Honor. Bill Hughes for the County Attorney's Office. Your Honor, the state is requesting that, pursuant to Article 2 Section 22, no bond be set in this matter. It's the state's intention to seek the death penalty in this matter. I've provided Mr. Sears with a copy of the notice of intent to seek the death penalty. We have it prepared and ready to file once a cause number is assigned in this matter, and so for those reasons, Your Honor, the state would request that no bond be set in this matter. Thank you.

Markham: Thank you. Mr. Sears, please.

John Sears: Your Honor, I have not received any discovery or information, even what the court has regarding the states' evidence in this case. I have represented Mr. DeMocker since the date of these events. At this point, I want to preserve my right to a *Simpson* hearing in this case. I ask that the court set one in its earliest opportunity. I think Mr. Hughes and I can address the time and the scheduling of such a hearing. Nonetheless, for purposes of today's hearing, the state has the responsibility and the burden of showing to this court that either the proof of guilt of my client as to the capital offense is evident or the presumption of his guilt is great. If the court has information available to it, I would ask for an opportunity to review that before I specifically address what the state's case is. My understanding generally is that this is a circumstantial case with no witnesses, no confessions. I do not know whether the state is claiming to have any physical evidence that would tie my client to these events. And for that reason, I'd ask just a moment to review what the court has, or if the state has a copy for me before I speak further.

Markham: Do you have a copy of the probable cause statement?

Sears: I do, Your Honor.

Markham: Okay. So maybe Mr.--

Sears: If I could step back and just have a moment to do that.

Markham: Sure. Let's both read this probable cause statement. And so we're on hold here, Mr. DeMocker, don't say a word. And, Mr. Sears, how long has it been slowing down the ____ read this carefully? Alright, Mr. Sears.

Sears: Your Honor, having just received this information, I am not in a position, of course, to respond today in any meaningful way, and I would just suggest that the court can see even from this probable cause statement that apparently the police do not have what they believe actually is a murder weapon. The physical evidence that is referenced has to do with footprints and bike tire tread patterns,

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and, beyond that, I don't see anything in my first read through this probable cause statement in case that the state has other physical evidence, this is a circumstantial case. Given the gravity of the offense, I would ask the court to find Mr. DeMocker, for purposes of today's hearing, bondable and set an appropriate bond. If the court's inclined to do that, I'd ask to be allowed to speak directly to bond. But I think, at this point, pending the *Simpson* hearing in this case, that's all I can say. I don't have adequate notice or an opportunity to defend at this point under the case law.

Markham: Okay. Any misuse of the standard proof for a non-bondable request is proof evidence that a person has committed one of the listed offenses, which certainly first degree murder is. Your comments as whether proof of evidence standard has been met or not, so.

Hughes: Your Honor, it's the state's opinion that that proof has been met and is set forth in the probable cause statement. In addition, I believe this court has reviewed a number of the search warrant affidavits that have been filed in this case. Those affidavits flesh out in much greater detail the information that was summarized in the probable cause statement.

Markham: You know, I prefer, _____, that, yes, I've seen affidavits for search warrants, but I prefer that anything that be used at this hearing be, quote, on the record. And so if you want to disclose affidavits for search warrants and have that be part of the record for this decision, I'd let Mr. Sears to have a chance to see that and respond to that that is appropriate, or otherwise I'm kind of--I think I'm going to limit my information for my decision-making purposes to what I'm presented here today.

Hughes: I understand, Your Honor. Your Honor, I believe the purpose of the *Simpson* hearing is to have a complete hearing into the determination of whether proof is _____ or the presumption is great. For purposes of today's hearing, I would ask that the court rely on the probable cause statement that's been provided to it. I believe that that, although, as Mr. Sears says it's a circumstantial case, that the court is aware and Mr. Sears is aware that from a legal standpoint the law makes no distinction between circumstantial and direct evidence and—and, in fact, that's a standard jury instruction in every criminal case. Your Honor, the probable cause statement is clear in the presumption is great and proof is evident. And I would ask that the court set a *Simpson* hearing within a reasonable time as the law requires but that the court hold the defendant without bond until such hearing.

Markham: Okay. And question, *Simpson* hearings would apply only if I find without bond or—and another question, if I do hold him without bond and set a *Simpson* hearing, it

was my understanding, at least as far as the cases involving somebody allegedly in this country illegally, that the *Simpson* hearing is held at the Superior Court before a court of--on the record, shall we--a court of record, shall we say, and so it would be at least, in that type of case, a Superior Court judge who would be make--having a hearing--

Sears: I would agree with that, Your Honor.

Markham: And so really it would seem to me that, Mr. Sears, that that point about whether it be this court or a court of record, so to speak, to hold a *Simpson* hearing.

Sears: I think *Simpson* hearings can be conducted in this court. If you read *Simpson* and you read a later case, *Sagura versus Kunan*, 530 Ariz. Adv. Rptr. 30, which is an April 24, 2008 court of appeals decision, they talk about applying the time when the Rule 7.4(b) of seven days from the date of the motion, I think we could treat the state's request in open court today as the motion under 13-3961(a) to hold the defendant non bondable, and I think that the--whether the case is in the superior court within seven days or not depends--this is --depends largely on the timing of dates that this court is about to set here today. But I think--I just want to make it clear that I am not conceding that today's hearing is my *Simpson* hearing. The case law is clear that this is not my--

Markham: I think that's--

Hughes: I would agree with that--

Sears: --*Simpson* hearing. I'm entitled to a--

Markham: I think--

Sears: --hearing where the state has the burden, and I've given more discovery, and we can confront and cross-examine witnesses. So I think, to answer your direct question, I think this court has the ability to say whether it makes sense to do that given what I understand the state's intention is with regard to a probable cause determination is another thing, and I would defer to Mr. Hughes on the timing of that.

Hughes: Your Honor, I would--and Mr. Sears is certainly correct that there is some case law authority for a *Simpson* hearing within seven days. I think he would also agree with me that cases have found that a reasonable time can be as great as 60 or more days. What I would suggest is that this court set a hearing in the early disposition court as it normally does, the early disposition court judge, which would be a superior court judge, could then set the *Simpson* hearing at that judge's

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discretion within the deadline that the case law and the rules allow and I--would be my suggestion, Your Honor.

Markham: Okay. Alright.

Sears: May I be _____?

Markham: Yes. Please, Mr. Sears, you can finish saying whatever you want to say.

Sears: Thank you. I've talked informally with Mr. Hughes about this fact. The court has been setting the EDC dates for next Thursday in the Verde. The court noticed that Judge Ainley presides over the disposition court. I'm advised that Mark Ainley has been assigned to this case and I've already met briefly with him here. I think, given the serious nature of these charges, if there were a way to schedule this case on the Tuesday, October 28 EDC calendar, Judge Geiger would take the case there at the state, is ready to go to EDC that day, then I would prefer doing that rather than trying to get another judge to come in next Thursday in Camp Verde just for purposes of conducting what I think is going to be a *pro forma* early disposition court hearing at that time. That's my suggestion.

Hughes: Your Honor, the state would ask that this be set in the normal course. It's not an unusual occurrence for Judge Ainley to have conflicts and, as of this date, it's my experience that she has never had a difficulty finding another superior court judge in the Verde Valley to step in and hear a case on a Thursday EDC setting if she has a conflict. She's done it many times before and I suspect will continue to do that in the future. As far as taking this case to EDC on Tuesday, I don't believe the state will be ready to have the case ready to go EDC in such a short period of time, particularly since today is a Friday and the defendant was just arrested late yesterday afternoon. So I would ask the court to set this in the normal course as it normally would for the Thursday. My office will certainly inform Judge Ainley's judicial assistant of the conflict so she'll be apprised ahead of time, which actually is a luxury that quite often she doesn't have for EDC conflict cases, so there will be an opportunity for her to have another superior court judge available for the Thursday EDC.

Markham: You--I'm going to say that -- you know, let me make a finding and then we'll get back and--I'm going to, for today--for the purpose of today's case, find that there is evident proof of the commission of the offense in what I see. So, yes, at least until further hearing or further motions of it, Mr. DeMocker is going to be held without bond until further notice. Mr. DeMocker, meaning you're just in custody, obviously. Just listen to your attorney's going to talk to you privately, Mr. DeMocker. I will be telling you to obey the laws, not to possess or drink any alcohol. Do not leave the state of Arizona without prior permission of the court.

And no contact with Ms. Kennedy's sister or, you know, what is it you're asking to do about victim's families?

Hughes: Your Honor, we'd ask that, at this point, the defendant have no contact with either the victim's mother, who is Ruth Simpson [sic], and the victim's children, who are – and I'm not sure if I have that information in front of me. I believe one of the girls is named Katie, and the other girl is named Charlotte.

Sears: If I could be heard on that party _____?

Markham: Yes, please.

Sears: Katherine and Charlotte are my client's children. Katherine's over the age of 18, but Katie was, until yesterday and is today, under the care and custody of my client. I have been involved with this case since the day after this happened. I am very well familiar with the girls, and my strong belief is that they will not want a no-contact order with their father, notwithstanding what the state has alleged here to the contrary. I think they are very much in support of their father, love their father, and want to participate in this case, so I don't think it's appropriate at this time, absent something further from victim witness that affirmatively says that they have invoked their victim's rights and wish no contact, that the court is simply ordering no contact. It may be a moot question for a short period of time while Mr. DeMocker remains in custody. But I just want to make the record clear that, with respect to Katie and Charlotte, they by no means consider themselves victims.

Hughes: And, Your Honor, I believe that the victim's rights law is such that the victims are going to have to opt out of--in other words, the victims are going to have to affirmatively ask to have contact. They have not done that. We certainly will be having contact with the adult daughter and certainly whoever is going to act as the guardian for the minor daughter and find out what their positions are, and we will keep the court apprised of what we find out.

Markham: Okay. I think --I think that that's kind of my understanding, too, Mr. Hughes. The girls might opt out and do want contact with their father, but I will say, Mr. DeMocker, until further notice, no contacting Ruth Simpson, or the mother of the victim, and no contacting either Charlotte or Katie until further notice by your daughters. If they opt out of the victim's rights provisions and want contact, they will certainly have the opportunity to let everybody know that, and if they say that, certainly I would unring that particular bell without contacting Charlotte and Katie if that was their wish. I'm going to tentatively set a--so it's--I'm held--holding him without bond until further hearing. But, Mr. Hughes, Mr. Sears' comment that a early disposition court really is a *pro forma* thing in this case,

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there obviously is not going to be any disposition ultimately at a early disposition court, and so really it's just a matter of seeing a superior court judge and waiting to see what happens as far as either preliminary hearings or grand jury indictments. And so it would seem to me that Mr. Sears' comment makes a certain amount of sense. I was to set something within seven days in case it happens to be my court that we'll be doing this. I happen to know I have no jury trial going next Thursday to set a *Simpson* hearing next Thursday, say starting at 10 o'clock in the morning, and what with the conflict of EDC time down in the Verde on Thursday, and might look at my calendar to say if I'm going to be doing it, Thursday is probably the day that I want to do it within seven days, and so, Mr. Hughes, I guess my inclination—I'll let you respond to it—is to do a special exception set in early disposition court for next Tuesday, October the 28th, at Division 5 of the Superior Court at 8 o'clock in the morning. Obviously, since Mr. DeMocker's in custody, we could hand walk through the paperwork, kind of a, you know, faster than normal fast, as far as getting the paperwork to the Superior Court, at least from our end of things. You know, yes, you'll be having to give disclosure to Mr. Sears, but I guess it's kind of understood that full disclosure's going to be difficult either Tuesday or Thursday in the nature of this type of case, particularly since you've indicated you're going to be filing that special notice. And so, you know--

Hughes: Your Honor, if I could be heard on one scheduling issue, and that would be if Your Honor would consider setting the *Simpson* hearing for a Friday afternoon at some time after noon. And my reason for that request is, if this case were to go to a grand jury proceeding, that grand jury proceeding would likely be on a Friday morning, and I think what would--it would streamline the process quite a bit if it went to that grand jury proceeding. At that point, the Superior Court would have its jurisdiction and would be able to conduct the *Simpson* hearing. So that would be my request. If it doesn't go to grand jury or for some reason there's was a no true show bill at the grand jury--

Sears: Can we put October 31st, please?

Markham: I'm just Mr. Sears--the comment about Friday, I guess, you know, that would actually be the eighth day, I guess, if I count tomorrow as the first day Friday. And so, two weeks, two Fridays from the eighth day. Mr. Sears?

Sears: Your Honor, here's my overarching concern. It has to do with the way in getting in front of a Superior Court judge to have that division, who is ultimately assigned responsibility for this case in the Superior Court, set what I think will be the actual *Simpson* hearing. And so if we went out, even if we went to EDC on Thursday and the State had not taken the case to grand jury at that point, then my limited experience in cases where there's no prior probable cause for termination

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and defendant doesn't waive his, that it could add extra delay before we actually wind up in front of a Superior Court judge for an arraignment, which we do the first time when we could get that date scheduled. What I'm looking for is a procedure that would streamline that process where, with counsel participating in some sort of cooperative fashion, we could sooner than that start to pick dates out and perhaps even know where the case is going to be assigned by next Tuesday so that we could work that division to set a *Simpson* date that gives the state time to attempt to present this case to a grand jury. That's my thought. And so a—you know, the Tuesday idea makes sense. That being the case, if I can have that accommodation from the court, and the state knows that that's what I'm going to try to do next Tuesday, then I don't object to setting the *Simpson* hearing in your court on the eighth day, Rule 7.4 notwithstanding, because my expectation is that we're not actually going to conduct it in your court.

Hughes: And, Your Honor, I think that's reasonable. Mr. Sears has already been in brief contact with Mr. Ainley. And Mr. Ainley will definitely be at that early disposition court hearing. We'll be able to meet with Mr. Sears and have some input at that point as to which division the case gets assigned to in the Superior Court. So I—

Markham: Okay.

Hughes: --I would recommend that course of action, also.

Markham: Okay. Just looking at my calendar on October 31st, Tuesday afternoon, I already have some things set so I'm going to set it for a tentative *Simpson* hearing, should I be the one to do it, for Friday October 31st at 9 o'clock in the morning. So a *Simpson* hearing set for Prescott Justice Court, unless otherwise set in the Superior Court—somebody put in a minute entry--October 31st at 9 o'clock in the morning. I will set an early disposition court procedure in this case for Division 5 on Tuesday, October the 28th, at 8 o'clock in the morning at the Division 5 of the Superior Court. I've already talked about the conditions of release being held without bond and the other no-contact orders. Obviously, if, on Tuesday counsel hear that the *Simpson* hearing is going to be set some other place other than the Prescott Justice Court, and we'd appreciate a heads-up so we know whether we're going for real or not. If we do know that there is going to be a *Simpson* for real, I assume that somebody would want a court reporter and so, again, gives a heads-up one way or the other whether that's going to go or not go so we know what to start to plan for. Mr. Hughes, anything further we can do here today's date, though?

Hughes: No, Your Honor, that would be —

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Markham: Mr. Sears?

Sears: Actually, Your Honor, I think the name of the victim's mother is Ruth Kennedy, not Ruth Simpson. I think we misspoke there.

Hughes: I would agree. I think it is Ruth Kennedy_____.

Markham: Okay, so Ruth Kennedy will be the mother of the victim he is to have no contact with, as well as Charlotte and Katie DeMocker, yes.

Sears: Steve, I'll come up and see you.

Markham: You hear that? Your attorney's going to come up and see you, Mr. DeMocker.

DeMocker: Thank you.

Markham: Alright. Alright. So I guess that will be it then for the day.